BRIEF IN SUPPORT OF THE FOREGOING PETITION

OPINION OF THE COURT BELOW

The Opinion of the Circuit Court of Appeals for the Sixth Circuit is reported in 109 Fed. 2 ed. at page 916. It is found on pages 102-4 of the Record.

Omitting the statement of the facts the court's opinion is as follows:

> "We think the court correctly dismissed the bill. By the plain terms of the Convertible Option clause the option to exchange the policy for any other form of insurance expired with the policy November 3, 1935. No effort was made to exercise the option within the period limited by the Convertible Option clause. There was no surrender of the old policy, no selection of a new one, and no payment of new premium rates prior to that date.
>
> It is said that equity will extend the time for the exercise of the option because of the impossibility of its performance within the time by reason of the insured's mental incapacity. This is no more than saying that equity will change the contract between the parties to meet a supposed hardship. The law is otherwise and 'equity will follow the law.' As a matter of fact, the asserted unconscionable hardship did not exist. Neil S. Amiot could no doubt have been appointed guardian at any time between November 22, 1934, and the expiration of the policy and option November 3, 1935, and might have applied for the new insurance at any time within that period. Too, the Amiot Company might have made the application at any time within the same period. Their failure to do so is chargeable to their own neglect.
>
> The decree is affirmed."

The Opinion of the District Court (R-94) is not officially reported.

JURISDICTION

The decree of the Circuit Court of Appeals (R-101) was entered February 16, 1940. It affirmed the decree of the District Court dismissing plaintiffs' bill of complaint.

A petition for a rehearing was filed on March 16, 1940 (R-105) and denied April 11, 1940 (R-109). The petition for certiorari was filed July 11, 1940. The jurisdiction of the court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 25, 1940.

Petitioners ask that a writ of certiorari be granted on the grounds that the Circuit Court of Appeals has decided an important question of local law in a way at least probably in conflict with applicable local decisions.

STATEMENT OF THE CASE

We refer the Court to the summary statement of the facts found on pages 2 to 4 of the foregoing petition.

ERRORS RELIED UPON

The Circuit Court of Appeals erred:

First: In holding that a court of equity cannot grant relief against delay in performing the procedural condition to the exercise of this option which conditions, by plain Act of God became impossible of performance within the stipulated time.

Second: In holding that payment of the new premium rate was a condition to be performed upon the exercise of the conversion privilege.

Third: In holding that no hardship existed because the son of the incompetent assured might have been appointed and made the exchange within the period specified, when in fact the nature of the policy was unknown to the family of the assured and no guardian was actually appointed until a few days after the expiration of the term policy.

Fourth: In holding that the beneficiary named in the term policy could have applied for the exchange when the policy does not give the beneficiary such right.

ARGUMENT

Courts of equity can and do relieve against the impossibility of performing formal or procedural conditions in insurance policies in cases where the very risk insured against will otherwise operate to prevent the assured from obtaining the benefits of the policy for which he has paid premiums.

See:

Mutual Life Ins. Co. vs. Johnson, 79 Law Ed. 398, 293 U.S. 335;

Marti vs. Midwest Life Ins. Co., 108 Neb. 845, 15 L.R.A. 1507.

Wilcox vs. Equitable Life Assurance Society, 173 N.Y. 50.

In *Marti vs. Midwest Life Insurance Company*, 108 Neb. 845, the Court granted relief against supervening impossibility of performing a condition precedent, which was modal or procedural in character. The policy provided as follows:

> "Should the insured, no premium being in default become totally and permanently disabled through bodily injury or disease originating after the delivery of this policy, so that there is no work, occupation or profession, either then or thereafter, that the insured can do or follow to earn or obtain any wages, compensation or profits, and proof of such condition are furnished to the Company at its home office to its entire satisfaction, the insured, after receiving notice from the Company that it has approved the evidence submitted of such total and

> permanent disability may elect one of the following options: First. Retain this policy as a fully paid up policy for its face amount; * * * etc."

The insured became insane and failed to pay the premium or submit proofs of disability and obtain notice from the Company that it has approved the evidence of disability submitted, and failed to make an election of the form of policy desired. After the death of the insured the beneficiary found the original policy, submitted proofs and exercised the option. The judgment for the plaintiff was affirmed by the Supreme Court of Nebraska. Justice Letton in the opinion of the Court said:

> "* * * Furthermore it would be a harsh rule that would say that in a case where a man was injured, so as to be totally non-compos mentis, within a few hours before the next payment on his policy became due and while it was still in force, the occurrence of the very contingency he was insuring against should deprive him or his beneficiaries of the benefit of the contract * * *."

In *Mutual Life Insurance Company vs. Johnson*, 79 Law Ed. 398 the Policy contained a provision for the waiver of the premium in case of disability, but on the express condition precedent that notice of such disability be given the insurer prior to any default in payment of the premium. The assured became insane prior to any default in the payment of the premium, but failed to give the requisite notice. The Company forfeited the policy. Mr. Justice Cardozo, speaking for the court, said:

> "We think the contract is to be interpreted in accordance with the law of Virginia where delivery was made (citing authorities). As to the meaning and obligation of such a policy the highest Court of the state has spoken in *Swann vs. Atlantic Life Insurance Co.*, 156 Va. 852, 159, S.E. 192, *supra*,

> construing a provision substantially the same as the one in controversy here. The ruling there was that notice was excused by physical and mental incapacity to give it. When the disability of the insured occurred while the policy was in force, he was entitled to have his premium waived until his death, for his disability continued until his death. That he should lose the benefit of his policy because he failed, through mental and physical incapacity, to present proofs would be harsh and unreasonable under the circumstances."

Under the law of Michigan, a forfeiture of rights under a policy of insurance will be avoided in cases of supervening impossibility of performing conditions which are modal or procedural in character, such as the following:

1. Failure of an insane assured to give notice of injury within 14 days, required as a condition precedent to liability on an accident insurance policy.

   Reed vs. Loyal Protective Association, 154 Mich. 161.

2. Failure of the beneficiary to bring suit within one year, as required as a condition to liability on a life insurance policy, where the assured disappeared and was unheard from for seven years.

   Lukaszewski vs. Woodmen of World, 270 Mich. 416.

3. Failure of an insane person to submit proof of loss required as a condition precedent to liability on a fire insurance policy.

   Valisano vs. Continental Insurance Co., 254 Mich. 122.

4. Failure of foreigner, unexperienced in business, to obtain the official receipt of the insurer and an endorsement on the application showing that the

first premium was paid in cash where such receipt and endorsement were required as conditions precedent to the policy taking effect before delivery, when in fact the premium was paid in cash at the time the application was signed.

New York Life Insurance Co. vs. Abromiates, 254 Mich. 622.

In *Valisano vs. Continental Insurance Company,* 254 Mich. 122, Chief Justice Butzel in the opinion of the Court, at page 124, quoted from *Reed vs. Loyal Protective Association,* 154 Mich. 161, 175 as follows:

> "But we are committed to the doctrine in insurance cases, that a provision requiring a notice on pain of forfeiture will not be construed to require strict performance, when by plain act of God it is made impossible of performance."

See also:

Phillips vs. Benevolent Society, 120 Mich. 142.

We now pass to the consideration of the facts in the case at bar and the application of the legal principles discussed. The controversy arises because it became impossible for the insured to exercise the right to change the form of the policy by reason of his physical and mental condition. That he was physically and mentally unable to exercise any of his rights from November 23, 1924 to the date of his death is not questioned.

Paragraph 9 of the Findings of Fact (R-32) reads as follows:

> "On or about November 22, 1934, the insured Hubert S. Amiot suffered a cerebral hemorrhage which totally and permanently incapacitated him until his death May 7, 1937. Mr. Amiot was confined to his bed from the time of said stroke until

his death. His condition during all of such period was regarded as critical by his physician who advised the members of his family accordingly. Mr. Amiot was totally mentally incompetent from and after said stroke until his death."

The conditions under which the insured was entitled to obtain any form of life or endowment policy issued by the Company were as follows:

FIRST: Request for an exchange after one year and within five years.

SECOND: Surrender of the original policy at the home office of the defendant.

THIRD: Conformance with the Company's rule regarding occupation.

FOURTH: Payment of the premium on the policy selected.

The request for the change of form of the insurance policy was made by the duly appointed guardian after the expiration of the five year period but within 30 days thereafter. The surrender of the original policy was likewise within thirty days after the expiration of the five year period. There had been no change in the occupation of the insured in violation of the Company's rule. The premium called for by the new form of policy was tendered within the 30-day period, after the expiration of the five year period.

The gist of this case is whether or not, under the facts disclosed by the record, the Court should avoid an unconscionable hardship by permitting an election within 31 days after the expiration of five years from the date of the policy.

We now pass to the consideration of the conditions under which the insured was entitled to change the form of his contract under the "Convertible Option" clause.

THE REQUEST FOR AN EXCHANGE

The choice of policies to be selected was fixed in the original policy as "any form of life or endowment policy issued by the Company." The new insurance could not exceed Fifteen Thousand Dollars ($15,000) Dollars, the amount of the original policy. The assured was given a choice as to the premium rate between the prevailing rate for his attained age or the prevailing rate for his age as of the date of the original policy plus the difference between the rate of the term policy and the prevailing rate on the policy selected, with interest on such difference. Within these limitations, the matter of selecting a form of policy was entirely in the discretion of Mr. Amiot. Within the time limited for the payment of the premium, the selection of a policy was purely modal or procedural in character, because an election would not obligate the insured to pay the premium on the policy selected. If Mr. Amiot had elected to convert the policy, had selected a new form of policy and surrendered the old policy, the Company could have done nothing but issue the policy selected and forfeit the same if the premium thereon was not paid when due or within the thirty day grace period provided by law.

We do not claim that the delay in requesting an exchange under the facts of this case could have the effect of extending the time in which to pay the premium on the new policy, beyond the thirty day grace period.

There was but a few days' delay in requesting the exchange. This delay was neither beneficial to the assured nor prejudicial to the Company. We admit that if there was any material change in the condition of the health of the assured during the period of delay, then a court of equity would not grant the relief prayed. Otherwise the Court would be extending the risk which the defendant assumed. The condition of the health of the assured was

equally as grave on November 3, 1935, and for a long time theretofore, as it was at any time before November 25, 1935 when the guardian made a formal request and tender. (R-32).

When Mr. Amiot suffered a complete physical and mental collapse he incurred the loss insured against by the "Convertible Option" clause. The very contingency insured against prevented him from obtaining the benefit of his contract. This case is within the purview of the adjudicated cases in which the courts have held that supervening impossibility such as insanity, excuses the failure to give the requisite notice, required as a condition precedent to the incurred liability, or as a condition precedent to the insured's right to the benefits of his contract regardless of whether such benefit be money payments, premium waivers or alternate form of policy.

See:

Marti vs. Midwest Life Insurance Co., 108 Neb. 845 (supra);

Mutual Life Insurance Company vs. Johnson, 79 Law, Ed. 398 (supra);

Reed vs. Loyal Protection Association, 154 Mich. 161 (supra).

THE SURRENDER OF THE ORIGINAL POLICY

The surrender of the original policy was purely modal or procedural and not substantive in character. The term of the policy expired as of the date we are seeking its exchange for an alternate form of policy. The Courts have held that supervening impossibility, such as loss of the policy, excuses the performance of this condition.

See:

Wilcox vs. Equitable Life, 173 N.Y. 50;

O'Cononr vs. Germania Life Ins. Co., 11 N.Y. (Misc.) 182.

CONFORMANCE WITH COMPANY'S RULES RE OCCUPATIONS

Mr. Amiot's occupation did not change from the time the original policy was issued until his death, although he was totally inactive after November, 1934. The evidence clearly shows that the occupation of Mr. Amiot at all times conformed to the defendant's rules regarding occupations. The Court so found (R-34).

THE PAYMENT OF THE PREMIUM ON THE POLICY SELECTED

This condition is substantive in character. Therefore, unless the premium was tendered within the time provided by law for the payment of the premium on the new policy, we have no standing in court. Whether or not such tender was timely made depends on whether or not the thirty day grace period provided by Sec. 12427 of the Compiled Laws of Michigan for 1929 and a like provision in the policy itself applies.

The application for the original policy was signed and delivered to the defendant's agent in Michigan. The policy was delivered by the defendant's agent to the insured in Michigan. The policy was, therefore, a Michigan contract and was governed by Michigan Law. The second policy, being a continuation of the original contract of insurance, would be a Michigan contract and therefore governed by Michigan Law, regardless of where it might have been delivered.

See:

Aetna Life Insurance Co. vs. Dunken, 69 Law Ed. 342 (supra, page 2).

The Michigan Compiled Laws of 1929, Sec. 12427, provides that no policy of life insurance shall be issued in

this state unless the same shall contain the following provisions:

> "Grace, Second. A provision of grace of one (1) month for the payment of every premium after the first year, which may be subject to an interest charge, during which month the insurance shall continue in force, which provision may contain a stipulation that if the insured shall die during the month of grace the overdue premium will be deducted in any settlement under the policy";

Under this statute the insured would have a month in which to pay the annual premium on the policy selected, unless the premium on the policy selected was not a premium "after the first year."

Whether or not the premium on the policy selected was a "premium after the first year," within the meaning of the statute, depends upon whether or not the policy selected would be a continuation of the original contract of insurance or a new contract.

The Supreme Court of Michigan has not passed upon this question. Therefore, on this question the Circuit Court was bound by the decision of this Court in *Aetna Life Insurance Company vs. Dunken,* 69 Law Ed. 342, to the effect that the second policy is a continuation of the original contract and not a new contract.

The policy involved in *Carlson vs. Scandia Life Insurance Company,* 170 Wis. 342, was dated *December 1, 1917.* It lapsed in case of military service unless a permit was obtained and an additional premium paid. The assured requested a permit for military service on *September 4, 1918,* but did not pay the additional premium required. The assured died in military service on October 2, 1918. The Court held that the additional premium on the permit was not a "first" premium, and, therefore, the grace period applied, and gave judgment for the plaintiff.

The case of *Silliman vs. International Life Insurance Company,* 131 Tenn. 303, is cited and followed in *Aetna Life Insurance Company vs. Dunken,* 60 Law Ed. 342. In the Silliman case the Court held that a provision contained in a new policy issued in pursuance of a convertible option in a five year term policy, limiting liability in the event of suicide "within one year from the date on which this insurance begins" means one year from the original contract of insurance and not one year from the date of the new policy.

Justice Sutherland of the Supreme Court of the United States, speaking of the Silliman case, in *Aetna Life Ins. Co. vs. Dunken,* said:

> "The Tennessee Court held that the two policies were in effect one and the same contract and that the insurance began within the meaning of the suicide clause in the second policy at the time the first policy was issued, since the dominant purpose of the parties was to carry out the provisons of the contract contained in that policy."

By analogy the premium on the new policy would be a "premium after the first year" and, therefore, the statutory grace period applies.

In determining whether or not the Michigan statute, providing a thirty day grace period applies to the time for paying the premium on the new policy selected, the Court should also note:

1. That the payment of the premium on the new policy selected is not expressly made a condition precedent or a concurrent condition to the exercise of the "Convertible Option."
2. That the payment of a premium on a life insurance policy is a condition subsequent and not a condition precedent. See *Thompson vs. Knickerbocker Life*

Insurance Co., 26 Law Ed. 765, wherein the Court said: "We do not accept the position that the payment of the annual premium is a condition precedent to the continuance of the policy. That is untrue. It is a condition subsequent only, the nonperformance of which may incur a forfeiture of the policy, or may not according to the circumstances."

3. The amount of the premium on the policy selected is solely within the knowledge of the defendant until it notifies the assured.
4. That the statute providing a grace period is for the protection of the insured and should be liberally construed to avoid a forfeiture.

The policy is dated November 3, 1930. All premiums thereon having been duly paid, the policy did not expire until November 3, 1935, at the earliest. The annual premium on the policy became due on the anniversary of the policy. The premium was tendered and the "Convertible Option" properly exercised by the guardian during the thirty day grace period provided for the payment of the premium, to-wit: on November 25, 1935. Therefore, there has been no breach of the condition requiring payment of the premium on the new policy.

That the incompetent assured and his estate should not be made to suffer for the neglect of any person in failing to have a guardian appointed for him seems elemental. The position of the Circuit Court on this point can not be reconciled with the many cases cited above to which it would seem equally applicable.

See:

Mutual Life Ins. v. Johnson, 79 Law Ed. 498.

This point was injected by the Circuit Court and was not raised by respondent's counsel in either the District Court or in the Circuit Court.

The fact that the term policy did not give the beneficiary the right to make the exchange would seem to be a sufficient answer to the Circuit Court's statement on this point. The conversion privilege was personal to Mr. Amiot and could be exercised only by him or his duly authorized guardian.

CONCLUSION

The Supreme Court of the State of Michigan has uniformly followed the same rule applied in *Mutual Life Insurance Company vs. Johnson.* In *Valesano vs. Continental Insurance Company,* already cited, Chief Justice Butzel stated the Michigan rule as follows:

> "But we are committed to the doctrine in insurance cases, that a provision requiring a notice under pain of forfeiture will not be construed to require strict performance, when by plain act of God it is made impossible of performance."

In the last analysis whe have here a case in which procedural conditions have been construed to require strict performance under pain of forfeiture when by plain act of God performance has been made impossible. The thing insured against by the Convertible Option has deprived Mr. Amiot of the benefits of his policy. There was no change in the position of either of the parties, which would make the granting of relief inequitable.

The decree of the Circuit Court is probably not in accordance with the applicable Michigan decisions. We, therefore, ask that a writ of certiorari be granted.

Respectfully submitted,

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